

The Prosecutor's Manual
Volume I – Chapter 7
Trial Preparation

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The Prosecutor's Manual

Volume I – Chapter 7

Trial Preparation

I. INTRODUCTION

Cases are lost by prosecutors because of:

1. Poor case evaluation
2. Poor preparation
3. Poor trial tactics
4. All of the above

II. INITIAL STEPS AND ORGANIZATION

A. Inspect the Charging Document

Be sure to check the charging document against the statute. Occasionally a pleading omits an essential allegation or contains a typographical error.

If you find defects in the charging document, see, A.R.S. Rules of Criminal Procedure, Rule 13.5.

B. Prepare Your Case File

Early organization in your case is important in the preparation of your case and will give you much more confidence later.

1. Adopt a System that Works for You

Whether you use a notebook, laptop, or file folder, or a combination of these, your filing system should be (1) mobile and provide for (2) easy retrieval.

2. Include in Your File

a. Logs

A chronological diary of everything that occurs with respect to your cases is easy to implement and can be very important.

Without "logging in" the details of your cases, you will find it impossible to remember the many things that occurred prior to trial.

It is, therefore, important to always have the file in front of you when you discuss the case or something happens which affects it. Many attorneys who receive calls about a case tell the caller to wait a moment until they get the file or just promise to call back after they pull the file. Do not be afraid to do that. As a lesser alternative, keep one log with you which includes a dairy of the events of every case.

Part of your log for a particular case might look something like this:

1-9-10 Called Det. Jones re: bringing over all info he has in his files.

1-12-10 Met w/Det. Jones. He will talk to wit. Jim Smith by the end of the week and get back to me.

1-14-10 Talked to accomplice witness by telephone. He assured me that he will not move or take any trips without notifying me. I sent him a subpoena.

1-20-10 Talked to Hersh (Def. Atty.). He says he wants to work it off. I told him "no deal". I offered plea to possession for sale and told him to let me know by 2-1-80 or we'd go to trial. I told him the prior was available for his inspection at his convenience.

Whether or not you adopt the log system for your many cases, you will soon discover its importance in the organization of your cases.

Example 1: Defense attorneys often tell you about a conversation you had with them a month ago (e.g.: "we'll take your offer to possession"). If you have your logs you can say unequivocally, "the offer was transportation".

Example 2: If another prosecutor takes a case for you at a hearing, the defense attorney may try to make a record about something that happened or you said to him. Your logs will help the substitute prosecutor discuss these tangential issues.

Example 3: If a State's witness has "testified" in the case but is unavailable for trial, your logs will help document that you tried to keep in touch with him and used every measure possible to locate him for trial.

b. Ideas

The ideas and insight section of your file may prove to be your most valuable portion. It is very important that when an idea on a particular case hits you, you write it down immediately, no matter how small, and file it for your final preparation.

c. Legal Issues to Research

A section should be devoted to legal issues which will or may arise. As you see the issue, be sure to write it down for later researching.

Review the facts and issues with an experienced prosecutor. She's sure to see other issues.

It is particularly impressive to a judge for an attorney to present briefs on major points.

d. Things to Do

Your "things to do" section for any felony will probably be at least a page long before the trial starts.

Examples:	Get Priors
	Pull Instructions
	Get Photos
	Have Police Try For Prints
	Call Officer Terry re: schedule

III. TALK TO AND/OR WRITE THE DEFENSE ATTORNEY

After this discussion, call and/or write the defense attorney and tell him you'll give him a certain time to make an offer or you'll begin to subpoena witnesses and prepare for trial. If the defense attorney does not meet your reasonable demands, commit yourself mentally and physically to preparing your case for

trial.

IV. GO TO THE CRIME SCENE

Most prosecutors will tell you that a visit to the scene will increase the evidence in your case significantly, sometimes by as much as 50%.

A. Mental Image Of The Scene

All of us visualize while we read – and if we have never been to the place we are reading about, our visualization from the usual police report will be 100% wrong. Think about that. You're trying to convince a jury that a certain witness could see something from a certain vantage point - yet, in your mind you have an erroneous picture of the setting. How are you going to get across to a jury what something looks like unless you know yourself? It simply cannot be done.

B. Cross-Examination

A visit to the scene will prepare you for any defense witness who testifies about the scene.

C. Photo Distortion

Not only will a visit to the scene give you perspective with respect to your photos, but often more importantly, will prevent the introduction of distorted pictures by the defense.

D. Follow-Up

Your viewing of the crime scene will let you know what follow-up to conduct, including a filmed re-enactment or additional pictures.

E. What To Take To The Scene

If possible, always take your investigating officer and appropriate witnesses with you to the scene both to get an accurate replay of the crime and to avoid becoming a witness if evidence is discovered. Allow your investigator to seize evidence and be sure he's present if you talk to anyone. Also, take a tape recorder, camera, and case file.

V. TALK TO THE WITNESSES

A. State's Witnesses

State's witnesses must be prepared for both your questions and the defense attorney's questions.

1. Be Friendly and Professional

Make your first visit with a witness as pleasant as possible. Always try to have the witness come to your office for the interview. If a witness is unable to come to you, you must go to see them - after office hours if necessary.

When the witness first comes in, make him comfortable by offering him a seat and a cup of coffee. Spend a minute just making small talk; it will pay dividends in relaxation and rapport.

Make the witness feel important by calling your receptionist and asking her to hold your calls. Put a "do not disturb" sign on your door to avoid interruptions from other attorneys.

2. Familiarization with Reports, etc.

Let the witness read all the police reports relating to his testimony. The witness should then read any other information or documents, prior testimony, etc. Give the witness a pen and ask him to make a check mark beside anything he reads which he doesn't agree with.

3. Narrative Relation

It is usually best to let the witness just tell the story in narrative, then go back and ask questions about inconsistencies, problems or details. Do not put words in the witness' mouth. He'll be much more credible and relaxed if you allow him to tell it his own way.

4. Discuss Defenses

Find out who else the witness talked to about the case. "Have you talked with the defense attorney? What did he ask?" This can give you valuable insight into what theories the defense will use at trial. Also, ask the witness what questions he thinks the defense attorney will ask. Answers will sometimes be surprisingly useful. The witness may know things that do not appear in any of the police reports regarding issues such as motive. The information may not be volunteered unless you ask because the witness thinks that it is common knowledge - after all, he may have known it for years.

5. Sensory Problems

Find out if your witness has any sensory problems. People who are hard of hearing tend to be especially defensive and may try to hide it. It is better to find out before trial than to have it come out during the trial.

6. Exhibits

Make sure the witness is thoroughly familiar with all exhibits he will be talking about. If witnesses will need to draw a diagram, etc., in court, have them do it in your office first. Tell them to draw the picture big, not to talk while drawing, and not to obstruct the jury's view while discussing the picture.

7. The Peace Officer

In the vast majority of your cases the peace officer is absolutely crucial to your success at trial. It is important that you understand his predispositions. Probably 90% of the officers you'll deal with in the preparation of your felony cases:

- a. Believe that the "important" part of their job is complete upon arrest or complaint.
- b. Do not know what evidence is or is not important for conviction.
- c. Will not attempt to gather all available evidence. The reasons for this are:
 - 1) Time limitations;
 - 2) The case is "strong enough" without it;
 - 3) Probable cause for arrest or search and not conviction is their goal;
 - 4) Ignorance - when in doubt about violation of constitutional right an officer will avoid the issue rather than risk looking foolish; and
 - 5) Inadvertence.
- d. Feel that they are but a cog in the assembly line of the criminal justice system after

the arrest. They're never told what's happening with the case and usually not even informed about a proposed plea agreement. Consequently, they feel resentment.

- e. Are anxious, rather than eager, about their courtroom testimony.

Most people, including beginning prosecutors, tend to view officers as "professional" witnesses. As it relates to 90% of your officers, nothing could be further from the truth. Ask your officers in your next felony case and you'll probably find that they have had little experience with felony jury trials. Many will reveal that their only consolation in appearing for trial is overtime pay.

8. Distance

If distance is important, have them point to something which is that distance. You'd be surprised how many people will say "50 feet" and then point to something 10 feet away in court.

9. Time

Times invariably seem longer than they were. A victim of an armed robbery will tell officers that the gun was pointed between his eyes for five minutes (but it seemed like an eternity). In reality, the robbery probably lasted no more than a minute. You should discuss this with your witness and explain how "time flies when you're not having fun".

Any jury will understand the contradiction if the witness says "it seemed like an eternity but was probably about a minute".

10. Heights and Weights

Some people are terrible at height and weight descriptions. The ability to describe these characteristics also varies with the discrepancy between the witness' height and that of the perpetrator. For example, the 5 foot woman will rarely be within 4 inches if the perpetrator was taller than 6 feet. Unfortunately, many officers "lock a witness in" by requiring an exact height. If this has occurred, be sure to tell the witness that you will ask her about it and prepare her for cross-examination.

11. Make Sure the Witness Knows His Importance

Explain to the witness what's going on and the importance of the witness' testimony. Make sure the witness knows exactly what's expected of him and where his testimony fits into the case. This should get him in a good frame of mind. It is a good idea to explain objections and what "sustained" and "overruled" mean. This will avoid a witness answering a defense question to which your objection has been sustained. If the witness will be sequestered from one another, explain the procedure in detail.

12. Preparation for Cross-Examination Attacks

If you anticipate an attack of some sort on your witness, warn the witness so he or she can be ready. Often victims in cases find themselves quickly on the defensive on cross-examination. Probably the worst example of this is a rape victim. Defense attorneys will try to paste them naked on the cover of the National Enquirer if you let them. If this is going to come up, handle it carefully, with respect for the witness's privacy, and with sympathy. We owe a duty to protect people we put on the stand from slanderous attacks. Along these same lines, prepare your witness so she won't get upset at your own questions such as "Are you married to the guy who jumped out of the tree, slugged you in the mouth and then raped you?"

13. Prior Felonies

If you are going to bring out a witness' prior felony convictions, explain why.

14. Eyewitnesses

Eyewitnesses need a thorough going-over. Are they sure? How sure? Why? If they have made prior identification by photo or out of a line-up, go over that so it will be good supporting evidence when the witness testifies (see, Identification Chapter, Volume I). Do not show the witness a photo lineup without an investigator present.

15. Experts

Experts need to be told to use terms that the jury will understand as well as the proper scientific ones. You yourself should go over an expert's testimony until you can understand the reasons for his opinions. You'll have to get the jury to understand these later. If feasible, go to his lab and see how his tests are done. Formulate your hypotheticals now! Ask the witness what his opinion is about the best way to present his testimony. Ask him what you might expect on cross. Ask him for help in countering defense experts.

16. Children

Children require special preparation. Establish rapport, show them in the courtroom, get their story down pat, cross-examine them. Make sure they understand your vocabulary. Don't talk over their heads. See Sexual Assault, Prosecutor's Manual, Vol. IV, for a detailed discussion of this topic.

17. Discrepancies Between Witnesses' Recollections

Your approach to discrepancies in recollection will depend upon the materiality of the discrepancy. If it is very material to your case you must try to reconcile the opinions. If it is not and reconciliation is impossible, don't worry about it. Just note for closing argument that there has never been a case where two people remember incidents exactly the same.

18. Accomplice Testimony

Your accomplice witness or those who are receiving leniency for their testimony must be dealt with at arm's length. Many prosecutors set the tone for the pretrial interview by informing the witness on tape of all the terms of the agreement in no uncertain language. This speech often ends with a warning to the effect that if the accomplice commits perjury he will be in jail forever and ever, plus life without parole.

Experienced prosecutors address the witness by his last name and expect reciprocation. A witness who calls you by your first name in an interview will do the same thing when he gets on the stand. The last thing you want is for the jury to feel that you are friends with these types of witnesses.

Make sure the entire agreement is in writing and that his statement is audio recorded. Prepare well for this interview and be sure to cover every contingency in the agreement (e.g.: What happens if the case by no fault of the witness is reversed on appeal?).

19. Mistrial Bait

Be sure to warn witnesses of any areas he must stay away from in his testimony - inadmissible evidence, prior record of defendant, etc.

20. Demonstrations

If your witness is going to perform an in-court demonstration (e.g. field sobriety tests), be sure to do a practice run.

B. Defense Witnesses

Potential witnesses for the defense must be contacted as quickly as possible.

1. Lay Witnesses - Foundation for Impeachment

If possible, have a different investigator question, or be with you when you question, a lay witness. Let the witness ramble in narrative about what he knows about the crime and the defendant. Then ask him specific questions to "tie him in" to his story.

2. Expert Witnesses

- a. Read everything you can on the subject area.
- b. Ask your own expert to feed you fruitful lines of questioning for cross-examination.
- c. Prepare all of your questions.
- d. Ask the expert if he minds if you audio record the interview. Be sure to bring an investigator in case he does.

VI. VIEW ALL TANGIBLE EVIDENCE AND PREPARE YOUR EXHIBITS

All items of evidence which you will introduce at trial should be carefully inspected. Put down on paper the persons you will need to get the property admitted and discuss foundational question with them.

Be familiar with your exhibits. This will help your presentation at trial go smoothly. Similarly, be familiar with the courtroom - know where to put any whiteboards, screens, projectors, etc., for maximum effect (jurors have been known to comment after a trial, "Gee, I wish I could have seen the diagram that everybody kept referring to.").

Make a list of all of your exhibits in the order which you intend to introduce them. Put the number of its introduction in front of the exhibit.

Have enough copies made of written exhibits so that each juror can have one (e.g.: accurate transcripts of tape recording). To be able to have and hold a copy of an exhibit is impressive to most jurors. It will also keep the disruption of waiting while the jury passes an exhibit around the box to a minimum.

Just prior to trial give the list and all of your evidence to the clerk and ask her if she would number the exhibits in the same order you have ordered them. Be sure there is some semblance of order when you give her the evidence so she can easily tag them. For pictures you might want to put a small exhibit number in pencil on the back so she'll know what number is intended.

As each piece of evidence is introduced be sure to check it off your list. If you don't do this, you'll often rest your case without introducing all of the evidence you intended to.

VII. SUBPOENA YOUR WITNESSES

It is a good habit to subpoena all of your known witnesses as soon as you become aware of the trial date.

It is also a good idea to note on the subpoena that the witness should call you a couple of weeks prior to trial to be sure the trial is still going.

Finally, make sure service has been accomplished (At the same time try to find out who the defense has served. It will not only give you an idea of the defense but also allow you to impeach for bias those who show up to testify of their volition).

VIII. CLOSING ARGUMENTS AND JURY INSTRUCTIONS

Write the first draft of your closing argument and draw your jury instructions before you write up your trial questions or do your opening statements.

A. Closing Arguments

The reason for preparing your closing early is that once you have decided what you want to tell the jury in closing you will be much better prepared to ask the foundational questions during trial which will allow your comments at the end of the trial.

There is probably not an experienced prosecutor who does not remember a trial where he wished he had asked some witness a certain question so that he could comment upon the answer in closing. Having failed to ask the question the prosecutor is usually precluded from commenting.

B. Jury Instructions

Many prosecutors feel that because most jury instructions have been standardized, the prosecutor need not pull his instructions until just before closing arguments. This is a big mistake.

1. Jury Instructions Help You Prepare Your Case

This gives you a framework within which to work. You will know exactly what evidence you will need to prove your case. For example, in a possession for sale case, where a quantity of drugs is found at an apartment, the instructions will reveal that you are going to have to prove: 1) possession; 2) knowledge that the drugs were there; 3) knowledge of the nature of the substance; and 4) intent to sell. By thinking about each element and how you will prove it, your case will come together.

a. Possession

Get the apartment manager to testify that he rented the place to the defendant. Check with the utilities to see who is listed as the responsible party for billing. Look to see if the defendant's name is on the mailbox. Look around inside - there may be magazines being sent to defendant at that address, posters on the wall that are identifiable as the defendant's, etc.

b. Knowledge

Find out where the contraband was in the apartment. Out in the open? In the medicine chest where defendant had his toiletries? In the closet where his clothes were?

c. Awareness of the Nature of the Substance

Check for prior arrests on similar charges and enrollment in drug program. Did he make any exculpatory statements like, "That's not my heroin!"?

d. Intent to Sell

Line up an expert to testify that the drugs seized would be a two year supply for an individual. If no syringes or other paraphernalia were found at the scene, bring it out. Find out whether the defendant

was employed - how was he living if he didn't have a job?

2. Weave Your Case Around the Instructions

Because the judge gives the jury instructions, they often carry a much higher level of credibility than anything you say in closing. If your opening, case-in-chief, and closing repeat some information found in one or two important jury instructions you will not only carry a higher level of credibility but will also have a higher potential for recollection by the jurors because of the repetition.

3. Compatibility of the Evidence with the Instruction

Often you will submit for the court's approval instructions which are based upon case law rather than the standard instructions. Judges are reluctant to give these instructions unless clearly based upon the evidence. For example, if your defendant hid out in a motel after the crime, you may have a great deal of trouble getting a flight instruction unless you have proved that he was attempting to conceal himself (e.g. using an assumed name).

4. The Defense Instructions

Defense attorneys often submit many instructions from case law. If you have not prepared for these instructions you will sometimes get stuck with a bad defense instruction that will kill you later. An example might be the submission by the defense of a circumstantial evidence instruction in a case where all the State's evidence is circumstantial. Although the defense attorney will be able to cite a case which appears to put a higher burden on the State than proof beyond a reasonable doubt, there is also a later case disapproving of this instruction.

Try to get the defendant's instructions early in the trial so you can research any strange instructions he may offer.

IX. DIRECT AND CROSS-EXAMINATION QUESTIONS

A. Write Out Every Question

It is strongly recommended that a beginning prosecutor write out every question he intends to ask every witness.

B. Do Not Read Your Questions

When you get to trial, know your questions so well that you don't have to read from them. Every beginning prosecutor who does not follow that procedure will find that he is not listening to the witness' answers. The failure to listen to a witness' answers will destroy your examination.

X. POINTERS FOR WITNESSES

You should make up your own list of "Pointers for Witnesses". Give the list to your witnesses early so they can absorb and remember it.

A. TELL THE TRUTH - The whole truth and nothing but the truth, so help you God. If you can't or won't, don't testify. Truth isn't easy; it never was and it probably was never intended to be.

B. DONT GUESS - If you don't know the answer simply say, "I don't know." The

questions are not a test of your intelligence and no one flunks the witness chair. The witness is rare who never says, "I don't know."

- C. UNDERSTAND THE QUESTION BEFORE YOU ANSWER - If you don't understand the question, say so, and ask the lawyer to repeat it. No one will penalize you because you didn't understand it. After all, lawyers are not infallible - they sometimes ask unintelligible questions. As a matter of fact, sometimes they don't even understand them (that's why on occasion you may hear them tell the court reporter to "strike that").
- D. TAKE YOUR TIME - You also do not get marked on the quickness of your answer. There is no greater ring of truth in your answer simply because it was delivered swiftly. After you understand the question, formulate an answer, and give it.
- E. ANSWER ONLY THE QUESTION ASKED - No more, no less! Don't ever volunteer information. Too often witnesses want to volunteer information because they feel that their answer is inadequate; that for some reason it won't quite be believed and that the only way for the truth to show through is to throw in a quick explanation or perhaps another fact to divert the lawyer's attention. When you feel that urge - stifle it. Volunteer nothing - and don't get the notion that the case will wallow in any half-truths without your sharp and incisive volunteered information. The system has worked for quite a while and it will probably continue working for sometime without your added insights. So when you see that the lawyers and court have left a gaping hole in the case (just the size of the truism you are about to give voluntarily) bite your lip - save it.
- F. TALK LOUDLY ENOUGH SO EVERYBODY CAN HEAR - I already know what you are going to say. I've talked to you before, remember? This time it is for the jury's benefit. There's nothing to be shy about - just tell the truth.
- G. DON'T NOD YOUR HEAD "YES" OR "NO" - The court reporter (that little man with the silently moving machine who types all through the proceedings) is at your feet for a purpose - he is supposed to "record" everything he hears. He can't hear nods, and even if he could, he might get half of them wrong because too often a "yes" nod is very close to a "no" nod. It's the same with "unhuhs" and "mmhmms" - they may mean something to you, but to the court reporter they may mean two or three dissimilar things. His job is to report, not interpret.
- H. DON'T LOOK AT THE LAWYER FOR HELP - You are literally out there by yourself. The lawyers and the court can help you only so much. You are not supposed to be helped with answers - they belong entirely to you. We (the lawyers) will save you from being brow-beaten, we will help you invoke any rights you may have in regard to your testimony, and we will (with our questions) enable you to clear up any ambiguities - but we won't give you any signals on what to say or when to say it. No one else will either, so don't bother to look. And, as a matter of fact, the jury may get the wrong impression - they may think you are looking to your attorney to supply you with the "right" answer. Don't let this happen. Don't look for any answers. Look at the jury.
- I. OTHER "NO-NOS" - Don't chew gum. Don't talk through your hand. Don't cover your face so the jury cannot see you, and don't wear sunglasses while being sworn in and testifying. Be open and direct through your appearance - look at the person asking questions, look at the jury, but don't stare at the floor while talking.

- J. WATCH OUT FOR QUESTIONS INVOLVING DISTANCES AND TIME - One of a lawyer's favorite questions is "What time did this happen?" Or, "How far away was he?" Often these questions are not looking for an exact answer. They are looking for an approximation so a frame of reference may be drawn. Unfortunately, however, they are not stated that way and the witness attempts to be exact. Of course, complete exactness, is almost always impossible. So if you do not know the exact time or measurements, don't be exact in your answer and don't guess at what the exact answer would be. Make an approximation and give it. Example: a witness gave a very detailed blow-by-blow account of the fight his son had been in. The cross-examiner tried to discredit him but was not very effective. Then the witness' attorney, obviously hoping to nail the lid shut with one deft question, smugly asked him how far from the fight he had been standing. The witness threw his head back and was obviously making a very exact computation on the ceiling. Then he lowered his head and quite deliberately announced "7-1/2 miles".
- K. BE CALM - There is nothing more embarrassing then to get dressed in your best suit, get to the courthouse on time, take the oath like a seasoned Marine, ascend the witness chair and then lead off loud and clear with the announcement that your name is "Milliam Willer".
- L. DONT FENCE WITH THE LAWYER - You are at a decided disadvantage. He may be obnoxious, but that is no concern of yours. He has a right to ask questions and, what is more important to you, he also has the right to have you answer his questions. And don't get the feeling that with your sharp and incredibly quick wit you can show the lawyer to be a fraud. If the lawyer is obnoxious the jury will sense it and take it out on him later.
- M. KEEP YOUR TEMPER IN CHECK - You can't think clearly when you lose your temper. You tend to exaggerate and say things that you don't really know to be true. The other lawyer may be trying to get you to lose your temper but don't do it. Don't give him the satisfaction.
- N. BE COURTEOUS - Courtesy is still constitutional, and people are still impressed by it - including juries.
- O. DON'T BE AFRAID TO SAY YOU HAVE TALKED TO THE PROSECUTOR ABOUT THE CASE - This is one of the favorite trick questions of all time. "Tell us all, Mr. Binswanger, how many times have you talked to the prosecutor about the case?" The witness gulps, suddenly thinks he has done something so bad that it will call for instant wrath, and recoups (he thinks) by lamely replying, "Never." The lawyers and half the jury then hang their heads because they know how silly that is. Of course, you talked to the prosecutor about the case - probably many times!
- P. TRIALS ARE SERIOUS BUSINESS - Be serious. Save your memorable one-liners for the office. There is no laugh-o-meter in the courtroom. Don't laugh at the jokes the defense attorney attempts to tell. Your job is to tell the jurors what you saw and heard on the day or night in question. The lawyers have heard it before and if the judge has not heard your story before, he has heard a dozen like it. When you look straight at the jury, it impresses them that you are not trying to hide anything.
- Q. DONT TALK TOO NEAR TO JURORS DURING RECESSES - Some courthouses have special rooms for witnesses during recesses. Find this room and stake a claim to part of it. If your courthouse doesn't have such a room, find an out-of-the-way room - not the one which the jurors use.

- R. WHEN YOU FINISH YOUR TESTIMONY, LEAVE - Don't stay in the courtroom or the courthouse. Go back to work, they're waiting for you.

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